No. 86-42

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

OLAF A. HALLSTROM and
MARY E. HALLSTROM,
Petitioners

v.

TILLAMOOK COUNTY,
a municipal corporation,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

I. Franklin Hunsaker*
James G. Driscoll
Thomas D. Adams

SULLIVANT, HOUSER, BAILEY
PENDERGRASS & HOFFMAN
1400 Pacwest Center
1211 S. W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 228-6351

Attorneys for Respondent

*Counsel of record

QUESTION PRESENTED

Did the United States Court of Appeals for the Ninth Circuit correctly rule that Petitioners ("the Hallstroms") failed to comply with the notice requirements of the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. § 6972 et seq.) and therefore failed to properly invoke federal subject matter jurisdiction in that they commenced this action against Respondent ("Tillamook County")[1/] before providing the statutorily-mandated 60-day advance notice of intent to sue to the appropriate federal and state authorities?

[1/]Tillamook County is a municipal corporation with no affiliation to any parent or subsidiary or related corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

The Hallstroms gave Tillamook County written notice of their intent to sue under RCRA on April 20, 1981. On April 9, 1982, the Hallstroms commenced this lawsuit. The Hallstroms alleged that Tillamook County had violated and was continuing to violate RCRA and that subject matter jurisdiction was therefore appropriate under 28 U.S.C. § 1331. (ERX 1-8, 16; ER 1-8, 17)[2/]

On March 2, 1983, nearly one year after they filed their lawsuit, the Hallstroms gave written notice of their claim to the Environmental Protection

---

[2/]References to "ERX" and "ER" are references to the Excerpt of Record on Cross-Appeal and Excerpt of Record, respectively, both of which were submitted to the Ninth Circuit in the proceedings before that Court.

Agency ("EPA") and the Oregon Department of Environmental Quality ("DEQ"). The EPA and DEQ had no other actual notice of the Hallstroms' claim prior to the commencement of this lawsuit. (ERX 16, 37-42, 74; ER 17)

The RCRA notice provisions applicable to suits brought by citizens-plaintiffs provide in pertinent part:

> "No action may be commenced under [the citizen suit provision] of this section --
>
> "(A) Prior to sixty days after the plaintiff has given notice of the violation to --
>
> "(i) the Administrator [of the EPA];
>
> "(ii) the State in which the alleged violation occurs; and
>
> "(iii) any alleged violator of such permit, standard, regulation, condition, requirement,

> prohibition, or order. . . ."

42 U.S.C. § 6972(b)(1).

Tillamook County challenged the Hallstroms' assertion of federal subject matter jurisdiction on the ground that the notice provisions of RCRA are threshold, jurisdictional requirements that the Hallstroms failed to satisfy. (ERX 30-42) The United States District Court for the District of Oregon, however, rejected Tillamook County's argument and held:

> "Neither the EPA nor the DEQ is a party in this action. In addition, [P]laintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days from that date to take appropriate steps to cure any violations it [sic] finds at the Tillamook County landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

> "To grant [D]efendant's [M]otion [for Summary Judgment] based on the notice provision would be a waste of judicial resources." (ERX 82)

Following trial and the entry of a Final Judgment and Decree (ERX 81-82; ER 176-77), the Hallstroms appealed certain rulings made by the District Court in connection with their RCRA claim and their claims based on state law. Tillamook County cross-appealed from the District Court's ruling regarding the Hallstroms' noncompliance with the RCRA notice requirements. The Court of Appeals reversed the District Court's ruling on the RCRA notice requirements and held that the Hallstroms' failure to satisfy the RCRA notice requirements precluded the exercise of federal subject matter jurisdiction. Hallstrom v. Tillamook

County, 844 F.2d 598 (9th Cir. 1988). The Court reasoned:

> "Anything other than a literal interpretation of the 60-day notice requirement of the federal environmental statutes would effectively render those provisions worthless. For instance, if a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.
>
> "Non-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a non-adversarial setting before suit is filed. Litigation should be a last resort only after other efforts have failed. . . . We believe that the 'jurisdictional prerequisite'

approach is more consistent with this design than the pragmatic approach."

844 F.2d at 601 (citation omitted).

The Hallstroms subsequently filed a Petition for Rehearing and a Suggestion for Rehearing en banc which were denied and rejected, respectively.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals in this matter is consistent with this Court's decision in Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981), and with decisions of other courts of appeals subsequent to Middlesex. There is no conflict between federal courts of appeals that have ruled on this statutory notice issue since this Court's decision

in Middlesex. Moreover, the decision in this matter is a straightforward application of the plain, unambiguous language in RCRA.

ARGUMENT

The decision of the Court of Appeals does not warrant review by this Court. That decision is entirely consistent with prior decisions of this Court and with recent decisions of other federal courts of appeals. For the reasons that follow, the Hallstroms' Petition for Writ of Certiorari should be denied.

1. There is no conflict between the federal circuit courts of appeals regarding the jurisdictional character of the notice provisions in federal environmental statutes, and the decision in this matter is consistent with the decision of this Court in Middlesex.

The Court of Appeals correctly ruled in this matter that the notice provisions in RCRA are jurisdictional prerequisites to the maintenance of a lawsuit by citizens-plaintiffs, such as the Hallstroms. That ruling reaches the identical result and adopts the reasoning expressed in Garcia v. Cecos Int'l, Inc., 761 F.2d 76 (1st Cir. 1985). Likewise, the decision in this matter is entirely consistent with the results and reasoning of the Sixth and Seventh Circuits in Walls v. Waste Resource Corp., 761 F.2d 311 (6th

Cir. 1985), and City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975), cert. den., 424 U.S. 927 (1976), respectively. Moreover, the decision in this matter is consistent with this Court's decision in Middlesex, supra.

The Hallstroms erroneously argue that the decision of the Court of Appeals in this matter "directly conflicts" with decisions of the Second, Third, Eighth and District of Columbia Circuits. (Pet. 7-8) Each of the decisions they cite -- Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir. 1975); Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231 (3d Cir. 1980), cert. den., 449 U.S. 1096 (1981); Hempstead Cty. & Nevada Cty. Project v. U.S.E.P.A., 700 F.2d 459 (8th Cir. 1983); and Natural Resources Defense

Council v. Train, 510 F.2d 692 (D.C. Cir. 1974) -- is distinguishable from this matter.

In Hempstead Cty. & Nevada Cty. Project v. U.S.E.P.A., supra, the Court held that it lacked jurisdiction to directly review an order by the EPA granting "interim status" to an operator of a proposed hazardous waste landfill facility. In considering which district court the matter should be transferred to, the Court acknowledged that a citizens' suit under RCRA "requires a notice to the Administrator of EPA, the state, and the alleged violator sixty (60) days prior to the filing of [a lawsuit]," but noted "that the purpose of such notice has long since been satisfied in the instant action." 700 F.2d at 463. The Court

failed to explain why the purpose of such notice had been "satisfied," but observed that the EPA had conceded at oral argument that no issue existed concerning the sufficiency of the notice provided by the citizens-plaintiffs. 700 F.2d at 463, n. 5.

The remaining decisions cited by the Hallstroms all predate this Court's decision in Middlesex, supra. In that matter, an organization sued various state and federal authorities under the Clean Water Act and the Marine Protection, Research and Sanctuaries Act to enjoin the dumping of wastes into the New York Harbor and the Hudson River. This Court held that the citizens-plaintiffs had no implied private right of action under those statutes or under 42 U.S.C. § 1983

to enforce alleged violations of statutory standards and also were prohibited from proceeding as citizens-plaintiffs because they failed to comply with the statutory notice provisions. 453 U.S. at 13-21. With respect to the jurisdictional character of those provisions, this Court ruled:

> "These citizen-suit provisions authorize private persons to sue for injunctions to enforce these statutes. Plaintiffs invoking these provisions first must comply with specified procedures -- which respondents here ignored -- including in most cases 60 days' prior notice to potential defendants."

453 U.S. at 14 (footnote omitted).

This Court's decision in Middlesex indicates clearly that the notice provisions in federal environmental statutes mean precisely what they say: advance notice is required prior to the

commencement of a lawsuit by a citizen-plaintiff. Plaintiffs cite no authority from any federal appellate court which has interpreted or applied this Court's decision in Middlesex. Indeed, the only federal appellate courts that have interpreted Middlesex have required strict adherence to the statutory notice requirements. See, Walls v. Waste Resource Corp., supra, 761 F.2d at 316-17; Garcia v. Cecos Int'l, Inc., supra, 761 F.2d at 81. The decision of the Court of Appeals in this matter imposes the same standard. Thus, since this Court's decision in Middlesex, the First, Sixth and Ninth Circuits have ruled uniformly that the notice provisions in federal environmental statutes have jurisdictional significance and must be strictly applied.

Clearly, there is no conflict among the circuit courts of appeals and no reason to review the decision in this matter.

2. The decision of the Court of Appeals in this matter is a straightforward application of the plain, unambiguous statutory requirements of RCRA.

The Hallstroms erroneously argue that the decision in this matter is somehow contrary to this Court's recent decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. ___, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987). (Pet. 8-10) In Gwaltney, this Court held that citizens-plaintiffs may not sue under the Clean Water Act for wholly past violations of the standards set forth in that statute. In reaching that conclusion, this Court reasoned that

any other interpretation of the Clean Water Act would render "incomprehensible" and purely "gratuitous" the requirement that the alleged violator be given 60 days advance notice of intent to sue. 98 L. Ed. 2d at 318-19. This Court did not, as the Hallstroms erroneously suggest, imply that the purpose of the 60-day notice requirement is to further some objective other than nonjudicial resolution of the alleged problem. Furthermore, this Court observed only that the purpose of notice to the alleged violator is to permit it an opportunity to bring itself into compliance with statutory standards and make a citizen suit unnecessary. Id. This Court did not articulate the purpose of notice to the EPA and the coordinate state agency, whom the Hallstroms failed

to timely notify in this matter.

This Court's decision in Gwaltney is entirely consistent with the decision in this matter. In Gwaltney, this Court restated the "well-settled" principle that the starting point for interpreting a statute is the language of the statute itself. 98 L. Ed. 2d at 316. That is precisely the approach expressly adopted and undertaken by the Court of Appeals in this matter:

> "Judge Wisdom wrote [in Garcia v. Cecos Int'l, Inc., supra], 'The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less "constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language." . . . The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. . . . [I]t is part of the jurisdictional conferral from Congress that

> cannot be altered by the courts.'. . ."

Hallstrom, supra, 844 F.2d at 600, quoting Garcia v. Cecos Int'l, Inc., supra, 761 F.2d at 78-79.

Like Gwaltney, the decision in this matter is a straightforward exercise in statutory interpretation. There is nothing remarkable about the result reached by the Court or the analysis employed to get there. Congress was explicit in its requirement that a citizen-plaintiff who intends to sue under RCRA provide 60 days' advance notice to the alleged violator, the EPA and the coordinate state agency. The Hallstroms did not comply with that requirement and their noncompliance precluded federal subject matter jurisdiction based on the plain language of RCRA, based on this

Court's decisions in Gwaltney and Middlesex, and based on the uniform decisions of other federal courts of appeals that have followed and applied Middlesex.

CONCLUSION

For the reasons set forth above, the Hallstroms' Petition for Writ of Certiorari should be denied.

DATED: August 4, 1988.

Respectfully submitted,

I. Franklin Hunsaker*
James G. Driscoll
Thomas D. Adams

BULLIVANT, HOUSER, BAILEY, PENDERGRASS & HOFFMAN

Attorneys for Respondent

*Counsel of record